Japan - FCN

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FROM : USPOLAD, Tokyo

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TO : THE DEPARTMENT OF STATE, WASHINGTON.

April 23, 1952
DATE

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3/19/82

SUBJECT: Informal Discussions on FCN Treaty

The comments contained in the Department's airgram under reference are appreciated by the Mission and will be most helpful during the review meetings to be held with the Japanese representatives at the conclusion of the present informal discussions on the FCN Treaty. The point raised in connection with Article II, paragraph 1 (a), will be clarified during the review meetings.

With reference to the Japanese suggestion that the phrase "accused of crime" be added to Article III, paragraph 2, it should be noted that this point is under study by the Japanese representatives and may not be raised again. The Mission agrees that the introduction of this concept would serve no useful purpose and believes that it would be so interpreted by the Japanese as to free them of the obligation of notification in cases of "administrative custody" and detention pending accusation of crime, which may be for as long as 21 days.

There are enclosed for the Department's further comment copies of memoranda of conversation on the third (February 29) and fifth (March 7) meetings on the FCN Treaty. The Japanese have not yet presented their suggested revisions to the memorandum covering the fourth meeting (March 4), at which Article VII was discussed.

The Japanese suggestions and proposals raised at the third meeting (Enclosure No. 1) and the fifth meeting (Enclosure No. 2) are summarized below for the Department's convenience:

1. The suggested use of "bodies" or "boards" in place of "tribunals" in the phrase "administrative tribunals and agencies" in Article V, paragraph 1 (Enclosure 1, page 2).

2. The suggested addition of the clause "as long as it is not contrary to public order and good morals" in Article V, paragraph 2 (Enclosure 1, page 2) with reference to the enforcement of arbitration awards.

3. The proposed inclusion of the "national and most-favored-nation treatment" concept in Article VI, paragraph 1 (Enclosure 1, page 4).

4. The proposal that "shall not be subject to molestation or to entry without just cause" be amended to read "shall not be subject to unlawful entry or molestation" in Article VI, paragraph 2 (Enclosure 1, page 5). (Note: Department previously

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agreed to this revision in its airgram A-442 of December 31, 1951).

5. The proposed deletion of paragraph 4, Article VI and its reinsertion as a separate Article, temporarily designated Article V-A (Enclosure No. 1, page 6). (Note: Department previously concurred in its airgram A-442, cited above).

6. The proposal that the last sentence, paragraph 5, Article VI, be amended to read "moreover, nationals and companies of either Party which have a substantial interest in enterprises shall be accorded..." (Enclosure No. 1, page 7).

7. The proposal that the phrase "for the exclusive account of their employers" be added to the second sentence, paragraph 1, Article VIII (Enclosure No. 2, page 1). (Department's previous comment contained in its airgram A-453 dated January 7, 1952).

8. The proposal that port pilots and notaries public be excepted from the provisions of Article VIII, paragraph 2 (Enclosure 2, page 2).

9. The proposal that the second sentence, paragraph 3, Article VIII be deleted and reinserted as a separate paragraph in Article XXI (Enclosure No. 2, page 3). (Note: The Department agreed in its airgram A-462, dated January 9, 1952).

For the Charge d'Affaires ad interim:

Frank A. Waring
Counselor for Economic Affairs

Enclosures:

Memorandum of Conversation on the third meeting, February 29, 1952.

Memorandum of Conversation on the fifth meeting, March 7, 1952.

Office of the United States Political
Adviser for Japan,
Tokyo.

MEMORANDUM OF CONVERSATION

Subject: Informa Discussions on the United States Standard Draft Treaty of Friendship, Commerce and Navigation

Participants: For the Ministry of Foreign Affairs:

Mr. Morio YUKAWA, Director, Economic Affairs Bureau
Mr. Kenichi OTABE, Vice Director, Economic Affairs Bureau
Mr. Haruki MORI, Chief, First Section, Economic Affairs Bureau
Mr. Masao OSATO, Chief, Fourth Section, Treaties Bureau
Mr. Takeshi KANEMATSU, Secretary, First Section, Economic Affairs, Bureau
Mr. Kay MIYA AWA, Secretary, First Section, Economic Affairs Bureau

For the Office of the United States Political Adviser, Japan:

Mr. Jules BASSIN, Legal Attache
Mr. Dudley G. SINGER, Commercial Attache
Mr. Robert W. ADAMS, Second Secretary

Place: Office of the United States Political Adviser, Tokyo, Japan

Date: February 29, 1952, Friday. THIRD INFORMAL MEETING

ARTICLE V

Mr. Otabe opened the third informal meeting by requesting the interpretation of the phrase "administrative tribunals and agencies" as used in Article V, paragraph 1.

Mr. Bassin stated that the use of the word "tribunal" does not imply the existence of administrative courts independent of the regular judiciary, where the same do not exist in a country, although it is broad enough obviously to cover them if and when they do exist.

In reply to a question raised by the Japanese for illustrations of "administrative tribunals" in the United States, Mr. Bassin cited the Federal Communications Commission, Federal Trade Commission, and the Secretary of Agriculture, whose functions are often described as "quasi-legislative" or "quasi-judicial". The precise extent to which their exercise of these functions is reviewable by the courts may vary, but all are subject to the rule of law and all must comply with procedures, limitations and standards prescribed by statue;

all are at least answerable to the courts for strict fulfillment of the requirements of the Constitution and of the statutes under which they operate; and none may adjudge crimes or impose criminal penalties, this being the prerogative of the judicial courts alone. Mr. Bassin expressed the view that because such administrative entities have now come profoundly to control and influence economic life, it is important to an alien that he enjoy the same right of access to them as a citizen, with reference to protecting and furthering his lawful rights and interests.

Mr. Bassin added that since the phrase "tribunals and agencies" has become standard in United States treaty practice, the American side would prefer not to delete one of the words, leaving the other standing alone, lest it be inferred that the intent was to narrow the scope of the provision. He further stated that if the word continued to trouble the Japanese, perhaps it would be possible to find some synonym for the whole phrase, or a substitute for the word "tribunals" such as "bodies" or "boards". If the problem is merely one of translation, he suggested leaving the term as it is in English but making a free translation into Japanese.

Mr. Otabe asked if Article V, paragraph 1 contemplated "extraordinary tribunals" whose establishment is prohibited by the Japanese Constitution (Article 76).

Mr. Bassin replied that Article V, paragraph 1 [redacted] did not refer to extraordinary tribunals" mentioned in the Japanese constitution but rather to "administrative tribunals" as had been previously indicated.

Mr. Otabe stated that this explanation was satisfactory in substance and the Foreign Office could translate the phrase "administrative tribunals and agencies" into Japanese so as to clarify that these were "administrative agencies" and not "extraordinary tribunals of justice". He added that the Japanese side would consider further whether to suggest the substitution of some synonym such as "bodies" or "boards" for the term "administrative tribunals", or to leave the latter unchanged and treat it as a mere matter of translation.

Mr. Yukawa suggested that a provision be included in Article V, paragraph 2 for "the mutual guarantee of the enforcement of an arbitration award by the parties as long as it is not contrary to public order and good morals" of the parties concerned. He indicated that the FCN Treaty between the United States and Greece was the basis for his suggestion.

Mr. Bassin replied that he did not believe the suggestion concerning "public order and morals" would serve a useful purpose. He pointed out that the provision contained in the standard draft left each country free to recognize and enforce awards, except with respect to two factors, namely, the nationality of the arbiters and the situs of the arbitration. Mr. Bassin said that under this provision each country is at liberty to apply such generally applicable commercial arbitration policy as it deems necessary. He stated that the treaty would not interfere if the local law refused to enforce an award, whether foreign or domestic, on the grounds that it was incompatible with "public order

or morality or any other legitimate standard. He further indicated that the treaty proposal is designed to allow the broadest flexibility and recognition of the present development of commercial arbitration law in the several states of the United States, and that the treaty seeks no more than to prevent arbitrary discrimination. Mr. Bassin added that the reference to "public policy" in the Greek treaty was necessary because of the affirmative manner in which the clause was drafted. It was indicated to the Japanese that if they would be willing to accept the Greek Treaty version in toto, it was believed Department would concur in making the substitution.

Mr. Yukawa stated that since Japan was invited under the Peace Treaty with Japan to join the International Convention on the Execution of Foreign Arbitral Award, he did not believe that the American side would have any objection to the Japanese suggestion with regard to the enforcement of awards.

Mr. Yukawa inquired whether the phrase "public policy" as employed in the FCN Treaty between the United States and Greece was broader than the meaning of the phrase suggested by the Japanese side.

Mr Bassin said that the phrase "public policy" was broader in meaning.

Mr. Otabe stated that under Japanese law, contracts may be made pursuant to the Civil Code and the Commercial Code. He then inquired whether Article V, paragraph 2 pertaining to arbitration was intended to cover both types of contracts.

Mr. Bassin replied that since there was no restriction in the standard draft as to the type of contract specified, it was intended to include all contracts, cognizable as such, under the laws of either party, such as, but not limited to, private contracts between landlord and tenant, and those concerning non-business loans, all of which are included with the meaning of Article V, paragraph 2.

Mr. Otabe requested a clarification of the word "domestication" and "registration" as used in Article V, paragraph 1.

Mr. Bassin replied that there are technical differences between the two words. "Domestication" connotes a process applicable to corporations that is approximately equivalent to the process of naturalization for an alien individual seeking citizenship. It means the act of organizing a corporation under domestic laws. "Registration", on the other hand, does no more, necessarily, than it implies; it contemplates a simple act of registration but does not imply that the corporation has in any way lost its alien juridical character. It is included because "registration" is often a name given to a process which subjects the alien corporation to a degree of local jurisdiction beyond that which is necessary in the circumstances envisaged in the treaty provisions namely access to courts and administrative agencies.

Mr. Adams then stated that it was the understanding of those present that there were no outstanding questions with reference to paragraph 1, but that

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with reference to paragraph 2, the Japanese representatives would in light of the discussion withdraw further their suggestion to include a provision requiring the enforcement of arbitration awards "as long as it is not contrary to public order and good morals", that they reserved their position on the word "tribunals", in substitution of which the words "bodies" or "boards" might be suggested, and that they would also consider as an alternative the substitution in toto of the pertinent paragraph as contained in the FCN Treaty between Greece and the United States.

ARTICLE VI

Mr. Sutton suggested that the "national and most-favored-nation treatment" provided for in Article VI, paragraph 5 should be accorded in the case of paragraph 1, since it is desirable clearly to define the standard of treatment with respect to the protection and security given to the property of the nationals of either party. He further stated that he did not believe anything would be gained by adopting this suggestion. Paragraph 1, he stated, is a simple assertion of a principle of international law that stands on its own merit. He indicated that it is a logical preface, couched in a traditional form, to the more specific provisions of the Articles; and it also serves as a residual basis for treaty protection in situations not expressly or adequately covered by the more detailed stipulations of the treaty, as, for example, with reference to vessels and cargoes which are covered in Article XIX. As such, it would require no buttressing by inserting a standard of national treatment. Moreover, he said, the precise standard of national treatment should not be written into a treaty except in relation to a particular and clearly definable subject-matter, with respect to which the two Parties can visualize the scope and boundaries of their commitment and can therefore know whether they are in a position scrupulously to undertake it. He stated further that so far as the content of Article VI is concerned, such subject-matter is found in paragraphs 2, 3 and the last sentence of paragraph 5. On the other hand, "protection" and "security" are rather large and indefinite concepts, with respect to which it would appear imprudent to undertake more than an "in principle" or "international law" type of commitment.

Mr. Adams added that the same theory was involved in support of this paragraph as was advanced with respect to Article XXI, paragraph 1.

The Japanese representatives observed that Article VII, paragraph 2 of the Greek Treaty provides for national and most-favored-nation treatment with regard to protection and security of property. They further inquired as to the reason why such national treatment and most favored-nation treatment is not included in the standard clause. They indicated a preference for most-favored-nation and national treatment provisions of the Greek Treaty.

Mr. Sutton expressed some doubt as to the reasons advanced in support of excluding national and most-favored-nation treatment from paragraph 1 of Article 6. He said that he found difficulty in understanding why there should not be a standard of compensation with regard to property rights while the international law concept was furnished concerning basic human rights as provided for in Article III, paragraph 2.

In reply, Mr. Bassin referred to Mr. Singer's remarks and emphasized the point that since Article VI, paragraph 1 was general in scope, it did not lend itself to specific commitments with regard to national and most-favored-nation treatment.

Mr. Yukawa suggested that in paragraph 2 the phrase "...shall no be subject to molestation or to entry without just cause" should be amended to read "... shall not be subject to unlawful entry or molestation" because "unlawful" is clearer than "without just cause".

Mr. Adams stated that for the purpose of these informal discussions there appeared to be no objection to the change suggested by Mr. Yukawa.

Mr. Yukawa asked whether he might understand that the phrase in paragraph 3 reading "compensation shall be in an effective realizable form" when property is taken, means that compensation may be paid in local currency since the question of the remittance of such compensation is governed by Article XII. Mr. Bassin said that this understanding was correct.

Mr. Yukawa further stated he understood that under the phrase "full equivalent of the property taken", the Japanese Government is not obligated to do more than it can under Article 29 of the Japanese Constitution which provides for "just compensation". He pointed out parenthetically that compensation for the lands taken under the Law Concerning the Special Measure for the Establishment of Owner Farmer (Agrarian Land Reform Law) did not necessarily represent the full equivalent of the property taken, and that the Supreme Court of Japan had upheld the compensation actually paid in the application of the said law, because of the financial condition of Japan at the time. This, he said was considered a rare case occurring under an "exceptional situation", and he assumed that similar cases would not occur under normal conditions. Mr. Yukawa felt it proper, however, to bring the decision of the Supreme Court of Japan to the attention of the American side.

Mr. Bassin indicated that the phrase "full equivalent of the property taken" did not obligate Japan to undertake a commitment beyond that required by the constitutional provision of "just compensation". He added that the American constitution also contained a provision for "just compensation". The phrase "full equivalent of property taken" as used in paragraph 3 was interpreted by Mr. Bassin as defining the scope of "just compensation". Mr. Bassin stated that, although "compensation for property taken" is initially provided by authority of the legislature, the courts in cases before them often determine whether such compensation is "just". He added, however, that he did not believe such determination by the courts would prevent a sovereign power from further inquiry concerning the matter through diplomatic channels, where such action was indicated.

Mr. Nakamatsu inquired whether under Article VI, paragraph 3 the courts would be denied jurisdiction in the determination of just compensation. Mr. Bassin replied that no such denial was contemplated, but rather that the courts would be expected to exercise their judicial powers in determing such questions.

Mr. Kanematsu then stated that it was his understanding with regard to all the provisions of the standard draft that the treatment contemplated under international law would not be invoked until recourse had been had under the national and most-favored-nation treatment provisions. Mr. Bassin said that where national and most-favored-nation treatment was indicated in the standard draft it was intended that such treatment would be applicable.

Mr. Otabe inquired whether the word "it" appearing in the phrase "it needs for its economic development" in paragraph 4, Article VI, referred to "other party" as used in the same clause. Mr. Bassin stated that "it" refers to "other party".

Mr. Kanematsu asked whether the phrase in Article VI, paragraph 3, "full equivalent of the property taken" allowed for compensation in kind as provided for in some cases under Japanese law. Mr. Adams replied that the phrase in question did not preclude "compensation in kind".

Mr. Yukawa asked if there is any difference in the meaning between the word "taken" in the standard draft and the word "expropriation" in other treaties. He asked if the word "taken" includes use of the property by the Government for a public purpose.

Mr. Bassin stated that the words "taken" and "expropriation" are synonymous and that the word "taken" includes use of property for public purposes.

Mr. Yukawa stated that since the nature of the matters provided for in paragraph 4 is different from the nature of the matters provided for in the rest of the Article, it would seem proper to make paragraph 4 a separate and independent Article.

Mr. Adams replied that for the purpose of these informal discussions, there was no objection to the deletion of Article VI, paragraph 4 and its reinsertion in the standard draft as a separate Article. He suggested that the appropriate place for this article be between Article V and VI and that it be designated as Article V-A temporarily.

Mr. Yukawa asked whether "adequate provisions" as used in Article VI, paragraph 3 could be interpreted to mean "adequate procedures" for a clearer translation into Japanese. Mr. Bassin stated that such interpretation was correct.

Mr. Mori asked whether the last sentence of Article VI, paragraph 5, referred only to joint ownership by United States and Japanese nationals, or generally to any participation by United States nationals in enterprise in Japan. Mr. Bassin replied that this paragraph referred to any enterprise in Japan in which United States nationals and companies might have a substantial interest, as well as to any enterprise in the United States in which Japanese might have a substantial interest.

Mr. Otabe asked whether the Japanese Government could take only the enterprise of an American national for public purpose, while leaving enterprises of

other nationalities untouched, without violating the national and most-favored-nation treatment clause of paragraph 4. Mr. Adams replied that such action would generally be held to be in violation of paragraph 4, although it might be permissible in certain exceptional cases. Mr. Adams added that if it were found necessary to take real property from an American in order, for example, to carry out some Governmental construction program (such as improvement of waterways, the building of dams or bridges, highways or railroads), it might be possible that continuous or nearby properties of Japanese or non-American alien ownership might be left untouched. Such action would not violate the principles of paragraph 4 if there were clearly no discrimination against the American property owner so affected.

Apart from such individual cases, Mr. Adams stated that a general nationalization measure with respect to certain specific types of property (such as coastal lands in designated areas) or to specific fields of industrial production was a prerogative of Government. Such action, if clearly supported by law, would not violate the provisions of paragraph 4, provided, of course, all aliens were equally affected by this action.

In further response to Mr. Otabe, Mr. Adams stated that where an individual property was of joint Japanese-American ownership, that portion which was taken by the Government could not represent only the share owned by the American, but must be taken jointly from the Japanese and American owners in proportionate shares based on their participation in the property. In cases involving a third owner, a non-American alien, the burden would rest on all participants in accordance with their ownership interest. In the case of nationalization, total or partial (i.e. limitation on alien ownership of shares), under due process of law, the American and all other alien owners would be affected in precisely the same degree; any action contrary to this principle would be in violation of paragraph 4.

Mr. Otabe pointed out that since Article VI, paragraph 5 extends national and most-favored-nation treatment to "enterprises", it implied that such treatment would be extended to nationals of a third country who might have an interest in such enterprises. Mr. Otabe felt it inappropriate that an FCN Treaty between the United States and Japan should grant any rights, privileges or benefits to nationals of a third country with which Japan and the United States did not have any such treaty relationships. For this reason, and in the light of the comments made by Mr. Bassin, Mr. Otabe suggested that the last sentence in Article VI, paragraph 5 be amended substantially as follows: "... moreover, nationals and companies of either party which have a substantial interest in enterprises shall be accorded..."

Mr. Bassin in reply explained that, in matters related to the taking of private enterprises into public ownership, it might, from a practicable point of view, be difficult, if not impossible, to divorce the "substantial interest" of treaty nationals which the provision seeks to protect, from those interests of third country nationals involved in the same enterprise.

Mr. Adams stated that it was understood that all questions and points raised by the Japanese representatives had been resolved satisfactory with the exception of (1) the phraseology suggesting that "national and most-favored-nation treatment be extended to cover Article VI, paragraph 1, and (2) that the last sentence of Article VI, paragraph 5 be amended to read "moreover, nationals and companies of either party which have a substantial interest in enterprises shall be accorded ...".

It was also noted that, for the purpose of these informal discussions, agreement had been reached to (a) substitute in Article VI, paragraph 2 the word "unlawful" for the phrase "without just cause", and ( ) delete Article VI, paragraph 4 and reinsert it as a separate Article, temporarily designated as Article V-A.

The next meeting will be Tuesday, March 4, 1952, at 2:00 p.m.